

FILED

FEB 17 2004

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**PEOPLE FOR THE ETHICAL TREATMENT
OF ANIMALS,**

4115 Wisconsin Ave; N.W., Suite. 205
Washington, D.C. 20016

Plaintiff,

vs.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, and MIKE LEAVITT,**
in his official capacity as Administrator of the United
States Environmental Protection Agency,
1200 Pennsylvania Ave; N.W.
Washington, D.C. 20460,

Defendants.

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CASE NUMBER 1:04CV00257

JUDGE: Paul L. Friedman

DECK TYPE: FOIA/Privacy Act

DATE STAMP: 02/17/2004
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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552, as amended ("FOIA"), to obtain access to records in the possession of the United States Environmental Protection Agency ("EPA" or the "Agency") concerning developmental neurotoxicity testing and related issues and documents. Plaintiff seeks access to this information in order to determine whether EPA is acting in compliance with various statutes, rules, and regulations, including, without limiting the foregoing, those relating to animal welfare.

JURISDICTION

2. This Court has subject matter jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and jurisdiction over the Agency pursuant to 28 U.S.C. § 1331.

VENUE

3. Venue is appropriate pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391.

PARTIES

4. Plaintiff, People for the Ethical Treatment of Animals ("PETA"), is a nonprofit organization dedicated to the protection of animals. PETA is the requester of the information.

5. Defendant EPA is the federal agency in possession and control of the information that was requested by PETA.

**FACTS GIVING
RISE TO PLAINTIFF'S CAUSE OF ACTION**

FOIA REQUESTS

6. PETA submitted three FOIA requests to EPA by letters dated September 29, 2000, December 14, 2001, and January 3, 2002. To date, PETA has not received full and complete responses to its FOIA requests and has been denied access to EPA records for more than three years.

First FOIA Request

7. PETA's September 29, 2000, FOIA request sought production of the following documents:

a. Request No. 1—Orders, notices, or "Data-Call-Ins" ("DCI") under the Toxic Substances Control Act ("TSCA"), the Federal Insecticide, Fungicide, or Rodenticide Act ("FIFRA"), the Food Quality Protection Act, or any other law by which the EPA can require or request that data be submitted concerning a substance's potential developmental toxicity or developmental neurotoxicity. In response, EPA produced the following: i) on December 19,

2001, DCI information from 1999 and 2000 on two substances; and ii) on February 2, 2002, a Listing of Conditional Registrations under FIFRA for 1999 and 2000.

b. Request No. 2—Voluntary test agreements or enforceable consent agreements that involve conducting developmental toxicity, developmental neurotoxicity, or prenatal developmental toxicity tests: In response, EPA produced the following: i) on November 12, 2001, two consent orders with significant redactions, including the identity of one of the submitters; and ii) on January 14, 2003, two consent orders relating to 1,1,2-trichloroethane and dibasic esters.

c. Request No. 3—Drafts or proposed voluntary test agreements or consent agreements that involve conducting developmental toxicity, developmental neurotoxicity, or prenatal developmental toxicity tests. In response, EPA produced a draft consent order for maleic anhydride on January 14, 2003.

d. Request No. 4—Documents relating to the relevance of developmental neurotoxicity tests to human health risk assessment. In response, on November 16, 2001, EPA produced a listing of five potentially responsive documents without producing the documents themselves.

Second FOIA Request

8. By letter dated December 14, 2001, PETA submitted its second FOIA request to EPA. That request sought the following: The identities of individuals, corporations, or entities subject to DCIs under TSCA, FIFRA, or any other law that requires or requests data concerning any substance's potential developmental toxicity or developmental neurotoxicity.

9. In response, on February 11, 2002, EPA produced a three-page list of DCI

recipients from 1999.

Third FOIA Request

10. PETA's third FOIA request, dated January 3, 2002, called for all records associated with an EPA policy requiring the review of new or revised toxicity test methods in general, and the EPA's developmental neurotoxicity test in particular, by an agency advisory committee.

11. The Agency neither acknowledged the January 3, 2002, FOIA request, nor produced any responsive documents.

12. On April 9, 2002, PETA received an e-mail message from EPA seeking a clarification of the time frame for the documents PETA sought. PETA advised EPA's attorney advisor that the time frame had been discussed with the Agency's Public Information and Records Integrity Branch, which had agreed that given the substantial delay, any production would include 2001.

13. In reply to the Agency's April 9, 2002, e-mail message, PETA confirmed that the information should include 2001 and continued by stating, "please add in 2002 should this drag on much longer."

14. From April 9, 2002, until January 14, 2003, PETA heard nothing from the Agency in connection with the three outstanding FOIA request letters.

15. By letter dated January 14, 2003, EPA provided a few additional documents but provided nothing from 2000, 2001, or 2002, even though the cover letter acknowledged that PETA's FOIA requests embraced "documents generated between 1999 and 2001."

CONFIDENTIAL BUSINESS INFORMATION CLAIM

16. PETA also challenges the Agency's handling of confidentiality claims asserted by the submitters of the two consent orders that EPA produced on November 12, 2001.

17. Shortly after receiving the redacted documents, PETA's counsel notified EPA by letter dated December 14, 2001, that the redactions were being challenged. The Agency did not respond and nothing was done at that time as a result of the challenge.

18. On March 25, 2002, EPA and PETA personnel exchanged e-mail messages relating to the questionable redactions. PETA inquired as to the basis for the redactions and re-affirmed that it challenged the confidentiality claims as previously set forth in the letter of December 14, 2001.

19. That same day, March 25, 2002, EPA acknowledged that PETA was challenging the redactions.

20. On April 5, 2002, EPA reported to PETA that the Agency relied upon exemption 4 pertaining to confidential business information ("CBF"). EPA confirmed that the Agency would "interpret the language in [the March 25, 2002] e-mail to constitute a request to the Agency to challenge the confidentiality of the information ..." and that EPA would begin the review process.

21. Ten months later, by letter dated January 14, 2003, EPA informed PETA that its initial determination was to deny release of the redacted information because it might be legally entitled to confidential treatment.

22. By letter dated April 3, 2003, PETA filed an administrative appeal, requiring a

response within 20 days or a decision rendered pursuant to 40 C.F.R. § 2.104(j) and (k) in support of the Agency's continued noncompliance with the law with respect to the FOIA requests and the claims of confidentiality.

23. Despite PETA's timely appeal, nothing was done by EPA other than to acknowledge receipt of PETA's April 3, 2003, letter. From that date, up to and including the date of filing of this action, EPA has either failed or refused to act with respect to PETA's appeal and its underlying FOIA requests.

STATUTORY FRAMEWORK

24. FOIA requires agencies of the federal government, upon request, to release records to the public, unless the agency proves that the records fall within one of nine specific statutory exemptions. 5 U.S.C. § 552(b). If an exemption applies, the agency is required to disclose "any reasonably segregable portion of the record" containing the exempt material.

25. Upon receiving a FOIA request, an agency has 20 working days to respond. 5 U.S.C. § 552(a)(6)(A)(i). Although the agency may grant itself an extension of 10 additional days, FOIA does not permit an agency to delay a response indefinitely. 5 U.S.C. § 552(a)(6)(B)(i).

26. Under Section 552(a)(6)(A)(i), a requestor may appeal an agency's failure to disclose requested records. An agency must make a determination on any such appeal within 20 working days. 5 U.S.C. § 552(a)(6)(A)(ii).

27. By letter dated April 3, 2003, PETA appealed the denial of its FOIA requests as well as the claim of confidentiality.

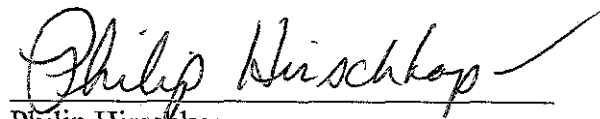
28. There is no statutory basis for the EPA's failure to disclose the requested information or for its failure to rule on the appeal, and PETA has a right of access to this information under FOIA.

PLAINTIFF'S CLAIM FOR RELIEF

WHEREFORE, Plaintiff prays this Court to:

- (1) Declare that EPA has violated FOIA by refusing to disclose and produce the records requested by Plaintiff;
- (2) Declare that EPA has violated FOIA by not responding to PETA's FOIA appeal for more than nine months past the 20-day statutory deadline for a response;
- (3) Order Defendants to make the requested records immediately available to Plaintiff or otherwise expedite this action pursuant to 28 U.S.C. § 1657(a);
- (4) Award Plaintiff its litigation costs and reasonable attorneys' fees in this action, pursuant to 5 U.S.C. § 552(a)(4)(E) and/or 28 U.S.C. § 2412(d); and
- (5) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,



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